

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL
75-7347

United States Court of Appeals
FOR THE SECOND CIRCUIT

JAMES WYPER, JR.,

Plaintiff-Appellant,

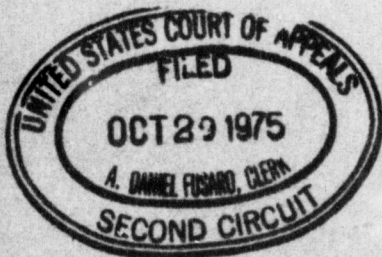
v.

PROVIDENCE WASHINGTON INSURANCE
COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLEE



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BRIEF OF DEFENDANT-APPELLEE

Statement of Case

This case involves a suit instituted on January 16, 1973, by the plaintiff, once president of the defendant, to recover benefits under the defendant's pension plan, which provided

. . . any employee who, after being ten years continuously in the service of the Company, shall become physically or mentally incapacitated to fill his or her position may be retired by a majority vote of the Pension Board from active service. Service with other similar institutions may be considered as with this Company for the purpose of calculating the term or service.

The plaintiff's complaint alleges that in late 1967, or early in 1968, he "became an alcoholic" and "as a consequence of such alcoholism" he "became physically or mentally incapacitated to fill his position as defendant's president."

The defendant maintains that its Pension Board, had it been requested to act by the plaintiff (which, in fact, it had not), was not obligated to allow a pension. Further, the defendant maintains that any rights which the plaintiff may have had were released by a document signed by the plaintiff on May 7, 1968.

The case was tried to a jury before Honorable M. Joseph Blumenfeld. Upon the conclusion of the plaintiff's case and after permitting the plaintiff to re-open his case for the purpose of seeking to void the release, the District Court directed judgment in favor of the defendant on the grounds that the plaintiff failed to prove that the defendant had acted in bad faith and that any decision other

than allowance of the claim would be arbitrary, fraudulent or in bad faith, and that the release ran to all rights, including the pension, and had not been proved to be void.

The plaintiff has now appealed to this Court.

Statement of Issues

- I. Whether the District Court applied the correct principles in regard to the pension plan?
- II. Whether the District Court was correct in directing the verdict upon the plaintiff's failure to sustain his burden of proof?
- III. Whether the release was valid and furnished sufficient basis for directing the verdict?

Statement of Facts

The plaintiff joined the defendant as Executive Vice President in September 1966. He later became the defendant's president. (App. 1, 2)

The plaintiff served as President of the defendant until May 7, 1968 when he resigned. (I. Tr. 44)

As above stated, the defendant had a pension plan which provided, in part, that an employee who "shall become physically or mentally incapacitated to fill his or her position may be retired by a majority vote of the Pension Board." (App. 1, 2)

Prior to his resignation, the plaintiff testified that he was capable of serving as President (I. Tr. 53) and that he was handling his position quite well. (IV. Tr. 2) He further testified that his attendance record was 100% (IV. Tr. 7, 8), and that he ran the defendant while working hard. (I. Tr. 42)

According to the plaintiff, he did not drink at the office and did not get intoxicated. (I. Tr. 41)

The plaintiff attended monthly meetings of the defendant's Board of Directors where, according to his testimony, he was the principal performer. (IV. Tr. 31) At these monthly meetings, the plaintiff reported his activities and discussed the company's matters with the Board of Directors. (IV. Tr. 32) The plaintiff testified that he did whatever was expected of him. (III. Tr. 234)

The plaintiff conducted the defendant's annual stockholders' meeting on May 7, 1968 and attended the meeting of the Board of Directors immediately thereafter. At the latter meeting, he submitted the names of employees for purpose of promotions and salary increases; he deliberately omitted his name for re-election as President. (I. Tr. 40, IV. Tr. 32) The plaintiff had been told by some of the directors in April 1968 that he was not the man for the job. (I. Tr. 40)

In substance, according to the plaintiff, there never was a time during the course of his employment that he was not able to handle his job, except for an occasional day. The plaintiff, in essence, testified that he was able to do a good job. (IV. Tr. 33, 34)

The plaintiff drove to work every morning without difficulty. (I. Tr. 66, III. Tr. 258, IV. Tr. 20) He was not incoherent upon returning home from work. (II. Tr. 136)

The plaintiff was examined by his own physician, Dr. William J. H. Fischer, Jr., on April 25, 1968, while he was still employed by the defendant. (V. Tr. 4) Dr. Fischer could not express any opinion as to whether the plaintiff was or was not fit to handle his position. (V. Tr. 29)

The plaintiff was subsequently examined on June 3, 1968, by Dr. Edward Nichols. (II. Tr. 94) Dr. Nichols opined that a physician could have found a month or two earlier that the plaintiff was not disabled from carrying on his job.

(II. Tr. 128) He testified that any opinion as to the plaintiff's capacity would depend upon the passage of time from the end of employment, or notification in April 1968, as to the forthcoming termination (II. Tr. 127), until the date of his examination of the plaintiff and the extent to which the plaintiff had consumed alcohol during the intervening period. (II. Tr. 128)

The plaintiff testified that he began drinking excessively towards the end of his employment; (I. Tr. 30) that he was depressed (I. Tr. 42) and upset (I. Tr. 50); and that after May 7, 1968, he consumed considerable amounts of alcohol. (III. Tr. 251)

On May 7, 1968, the plaintiff signed a document (III. Tr. 233) which stated that he accepted sums equal to his salary for the remainder of May, June and July in "full satisfaction of all claims" against the defendant, except those as a stockholder. (App. 2, III. Tr. 213, 263)

At the time of signing the release, the plaintiff acted perfectly normal; his speech and behavior were not abnormal. (III. Tr. 263) The plaintiff was not observed to have been drinking; he did not display any ill effects. (III. Tr. 263) At the time of signing the release, the plaintiff gave the impression that he understood the release. (III. Tr. 264) The plaintiff appeared competent and understood what was being transacted. (III. Tr. 264)

The plaintiff, shortly after May 7, 1968, (III. Tr. 253) asked whether he could be paid a pension. He was told that he had waived his rights under the pension plan. (III. Tr. 256, 257) The plaintiff was paid his salary thereafter for three months. (III. Tr. 239)

The plaintiff did not make any claim for a pension until November 1972. Shortly thereafter, in January 1973, he filed the complaint in this case. (III. Tr. 231, 232)

ARGUMENT

I. The District Court Applied the Correct Principles in Regard to the Pension Plan.

The pension plan is a Rhode Island contract, and subject to its laws. The plaintiff and the defendant agree that there is no Rhode Island authority directly in point and that the Court is free to seek guidance elsewhere. (F/N3, 21 the plaintiff's brief)

There is, moreover, no Connecticut law directly in point.

The plaintiff cites *Bird v. Connecticut Power Company*, 144 Conn. 456, 33 A. 2d 892 (1957).

The court in *Bird* was not called upon to pass on the authority of a discretionary board administering a written pension plan. The court was not concerned with the actual pension plan in effect at the time of Bird's termination. It was concerned with Bird's claim for supplementary payments under a practice whereby the Board of Directors of the employer had voted in individual cases to make voluntary payments to supplement those made under the insured plan.

Such supplementary payments had been voted in individual early retirement cases usually because of physical disability. At the very least the employee had to show that his leaving was caused by disability. As a matter of law, Bird's leaving was because of criminal dishonest misconduct calling for incarceration. In light of Bird's inability as a matter of law to surmount proof of his pending incarceration, that Court was required to go no further and, hence, did not pass on the issues involved in this case.

For purposes of this case, the defendant does not contend that its pension plan is gratuitous. The defendant does claim that the operation of the pension plan is sub-

ject to its terms and the reasonable discretion of the Pension Board.

The District Court adopted and followed the standards set forth in *Matthews v. Swift & Company*, 465 F. 2d 814 (5th Cir., 1972), *Barbaree v. Independent Life & Acc. Ins. Co.*, 481 F.2d 1280 (5th Cir., 1973), *per curiam*; *Gitelson v. DuPont*, 17 N.Y.S. 2d 46, 268 N.Y.S. 2d 11, 215 N.E. 2d 336 (1966).

The Court in *Matthews*, a case involving a pension plan substantially like that involved here, wrote, at page 821,

It does not appear whether the Pension Board has affirmatively decided by a majority of its members that Matthews is not entitled to the disability pension which he claims, or has only negatively failed to decide that he is so entitled. In either event, before the Judge's discretion can be substituted for that of the Pension Board under the plan, Matthews has the burden of proving such a clear case of permanent disability that no honest tribunal could reach any other decision and the burden of proving that any other decision is or would be arbitrary, fraudulent or in bad faith.

Under the provisions of Swift's Pension Plan, before the district court could adjudge that the plaintiff, Matthews, was entitled to disability benefits under the Plan, it must find either that a decision actually reached by the Pension Board was arbitrary, fraudulent or in bad faith, or, if the Pension Board had made no decision, that it could not fairly and in good faith decide against Matthews upon the evidence presented before the Court. The Court made no such finding.

The *Matthews*' tests are consistent with hornbook principles governing judicial review of the decisions of corpo-

rate bodies. *Teren v. First National Bank of Chicago*, 412 P. 2d 794 (Ore., 1966).

Any other rules would permit, if not encourage, an employee to come into court and obtain a complete hearing *de novo*. There is no reason for believing that a Connecticut state court would permit such a result.

The case of *Marsh v. Greyhound Lines, Inc.*, 488 F. 2d 278 (5th Cir., 1974), cited by the plaintiff, does not change the basic propositions enunciated in *Matthews*. *Marsh* simply indicates that a total lack of evidence to support disallowance of the claim is one way to prove bad faith.

II. The District Court Was Correct in Directing the Verdict Upon Plaintiff's Failure to Sustain His Burden of Proof.

It is acknowledged that the Court, in considering the defendant's motion for a directed verdict, is to view the evidence in the light most favorable to the plaintiff. *Pinto v. Spigner*, 163 Conn. 191, 302 A2d 266 (1972).

The issue, under the plan for the Board to have resolved (if it, in fact, had ever been presented with the question) is whether the plaintiff was "mentally or physically incapacitated to fill his" position.

The pension plan does not require the defendant to investigate plaintiff's condition. No cases are cited by the plaintiff in support of his contention that the defendant is obliged to do so.

The evidence clearly demonstrates that the defendant had basis in fact to reject the plaintiff's claims.

The plaintiff, in his brief, fails to mention his own testimony. This, in itself, is fatal to plaintiff's cause.

The plaintiff testified that he was capably managing the defendant and able to perform his work; that he par-

ticipated in the meetings of the defendant's Board of Directors; and that he conducted the May 7, 1968 Annual Meeting of the shareholders. Should the plaintiff not be bound by his own testimony? The fact that the plaintiff does not deal with this evidence, strong as it is, is an admission on his part that he cannot defeat its force.

This, in and by itself, provides a sufficient basis upon which the defendant's pension board, had it been requested to consider the plaintiff's claim, could have disallowed that claim.

The testimony of Dr. Fischer, had it been presented to the defendant's pension board, would not have compelled a favorable decision for the plaintiff. The doctor said that he could not express an opinion as to the plaintiff's competency. Dr. Nichols testified that a doctor could have ruled the plaintiff competent and, therefore, ineligible for any pension benefits.

The Pension Board could, therefore, in good faith have decided that the plaintiff was not "physically or mentally incapacitated".

The testimony of Messrs. Magner, Perry, Jr. and Morris did not require a decision by the defendant that the plaintiff was incapacitated on account of disability due to alcoholism. The plaintiff misperceives the issue. Proof of drinking does not equate with proof that the plaintiff was "physically or mentally incapacitated" because of alcoholism; it certainly does not prove that the defendant's Pension Board would have had no basis in fact to deny a pension if a claim for it had been made.

Had the defendant been requested to act, it would have had the discretion to reject the plaintiff's claims in good faith. The evidence provides reasonable grounds for the defendant to have so acted.

The plaintiff apparently refuses to accept the *Matthews'* doctrine. Nowhere in his brief does he appear to claim that he could prevail under the *Matthews'* tests.

And, as to any general claim of bad faith or arbitrariness, the plaintiff was required to prove a "dishonest" purpose. *Hartford National Bank and Trust Co. v. Credenza*, 119 Conn. 368, 177 A. 132 (1935). The plaintiff failed to satisfy this evidentiary burden by overwhelming proof. *Menke v. Thompson*, 140 F2d 786 (8th Cir., 1944).

The plaintiff knew during the month before the May 7 meeting that he was not considered the man for the job, and that he was going to resign on May 7th. It does not appear that there was ever any discussion between the plaintiff or the defendant of any claimed disability.

The plaintiff resigned on May 7 and executed a release in return for three months' pay. The plaintiff intended to seek a new association. The plaintiff, during the month of his resignation, discussed his situation with a director of the defendant, but there was never any discussion of any claim of alleged disability.

It was more than four years later that the plaintiff first raised the claim of "disability". The plaintiff should not be permitted now to make such claim and allege "bad faith" when the evidence clearly shows that no such claim was either discussed, or even contemplated, at the time of his resignation.

The decision of the District Court should not be disturbed.

III. The Release Was Valid and Furnished Sufficient Ground for Directing the Verdict.

The release was pleaded as a matter of special defense. It was introduced as a full exhibit during cross-examination of the plaintiff, (IV. Tr. 9) after having been marked by the plaintiff during his own case for purposes of identification. (I. Tr. 46)

At the close of the plaintiff's case, the plaintiff having rested, the defendant moved for a directed verdict based upon the release. The plaintiff was permitted to re-open his case for purposes of attacking the validity of the release. The plaintiff did call witnesses, and examined them. (III. Tr. 196)

Without merit is the plaintiff's contention that his rights were prejudiced because he failed to call certain witnesses. The plaintiff has no right to rely on the defendant's calling of witnesses which would give him the opportunity to cross-examine the witnesses.

In order to prove that the release was voidable, with its presumption of validity, the plaintiff had to prove that, at the time of the signing, his lack of mental capacity was so great as to render him incapable of understanding its effect and that Branch, the director of the defendant, so realized. *Cooney v. Lincoln*, 21 R.I. 246, 42 A. 867 (1899).

The evidence clearly does not support such a claim.

The release was signed by the plaintiff in his own handwriting. The evidence clearly suggests that the plaintiff was physically competent and not impaired.

The situation here is like that in *Caulkins v. Fry*, 35 Conn. 170, 171-172 (1868), in which the Court stated the standard in the following words:

Perhaps it stands thus: one cannot defend by proving his drunkenness, unless he can show that the drunkenness was known to the payee and taken advantage of by him; or that it was complete and suspended all use of the mind at the time. See also 1 *Story Eq. Jur.* §§ 231-3, and cases there cited.

Excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding, is not found, certainly not in terms; and we think the

finding is not equivalent to that. On the contrary, the facts found seem to indicate a less degree of intoxication. He was capable of writing his name, and, so far as appears, in a manner not to excite suspicion.

To avoid the release, the plaintiff offered only his testimony that he did not now remember signing the release, that it was his signature, and that he had done some drinking after leaving the meeting of the Board of Directors on May 7.

There was no evidence upon which the jury could have determined to avoid the release. Even if the jury chose to disregard the testimony of the witness Branch as to the quality of plaintiff's conduct and appearance at the time of the signing of the release, the rejection of the witness Branch's testimony would not be sufficient to fill the void left by the plaintiff's lack of affirmative testimony.

The plaintiff's brief attacks the credibility of the testimony of Branch, charging that he "retailored" his testimony on the release.

All of the testimony of Branch which shows inconsistency or rather uncertainty as to certain times are trivial and unimportant.

The argument in the plaintiff's brief ignores an important point in the Court's opinion, which appears in the following language (App. 5)

Mr. Branch testifies that when he was there there was no indication in Mr. Wyper's conduct or appearance that he was then under the influence of liquor or incompetent in any way to transact business.

But again we run into this problem of burden of proof. Let's assume that this is a voidable transaction if Mr. Wyper was, in fact, so intoxicated that he was unfit to transact business; that is, understand in a reasonable

manner the nature and consequences of the transaction, or was unable to act in a reasonable manner in relation to the transaction.

We don't have anything except the testimony of Mr. Branch that everything was reasonable, that they discussed the fact that he was giving up other fringe benefits—a question that was raised by Mr. Wyper. But if that is not believed, it doesn't mean the opposite is true.

The question then is whether the plaintiff has proved here that the other party, in this case Mr. Branch, had reason to know that by reason of intoxication Mr. Wyper was unable to understand in a reasonable manner the nature and consequences of the transaction, or that he was unable to act in a reasonable manner in relation to the transaction.

As above stated, the only evidence offered by the plaintiff was his own testimony that he did not remember signing the release, and that he had done some drinking after leaving the meeting of the Board of Directors on May 7. But as stated in *Williston on Contracts*, § 258

It is not every degree of intoxication that renders a person incapable in a legal sense. In order to make out incapacity, it is necessary to prove that a man was so far intoxicated as to be incapable in fact of understanding the nature of the transaction in which he engaged.

The plaintiff failed to take any steps to disaffirm the agreement made by the release. Even if the release had been voidable, this failure would have been fatal to his case. *Williston on Contracts*, §§ 258, 259, 260.

Conclusion

For the reasons stated above, the District Court was correct in directing a verdict for the defendant. The plaintiff failed to prove to such a clear case of physical or mental incompetency to fulfill his job requirements that no honest tribunal could reach any decision other than to award the plaintiff a pension. The plaintiff failed to prove that the release was void. The judgment should be affirmed.

Respectfully submitted,

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(58868)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES WYPER, JR.,

Plaintiff-Appellant,

against

PROVIDENCE WASHINGTON INSURANCE CO.,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes
and says that he is over the age of 18 years. That on the 29th
day of October, 1975, he served two copies of the
Brief of Defendant-Appellee on
Paul W. Orth, Esq., Hoppin, Carey & Powell

the attorney^s for the Plaintiff-Appellant
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney^s at
No. 266 Pearl Street, Hartford, Conn. (xxx)xxx.,
that being the address designated by the m for that purpose upon
the preceding papers in this action.

Irving Lightman

Sworn to before me this

29th day of October, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976